

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the Matter of:

STUDENT,

Petitioner,

vs.

NEWPORT-MESA UNIFIED SCHOOL
DISTRICT,

Respondent.

OAH CASE NO. N2006100381

**ORDER DENYING DISTRICT'S
MOTION TO DISMISS FOR FAILURE
TO PARTICIPATE IN RESOLUTION
SESSION**

On December 8, 2006, Brian Sciacca, attorney for the District, filed a motion to dismiss the due process complaint filed by Student on October 6, 2006, because Student's parents failed to participate in a mandatory resolution session. On December 13, 2006, Paul Roberts and Drew Massey, attorneys for Student, filed an opposition to the motion to dismiss. On December 14, 2006, Mr. Sciacca filed a reply to the opposition.

BACKGROUND

The District's motion included a sworn declaration signed under penalty of perjury from Haley Bolton, administrative assistant in the District's special education department. Ms. Bolton declares that she provided timely written notice to Student's parents on October 12 and 31, 2006, regarding resolution session meetings that had been scheduled and that she spoke to Student's mother by telephone on October 19 who told her that she would not attend the resolution session and to contact her attorney for further information. The District received a written response from John Nolte, an attorney with the Law Offices of Maureen Graves who filed the due process complaint, on October 19 and November 6 indicating that no one from his office was available to attend the resolution session and that Student would be willing waive the resolution session or reschedule and waive the 15-day rule. The District did not respond the offer to waive the resolution session and the parents have not attended a resolution session to date.

Student's opposition asserts that the District did not properly notify Student's parents of the scheduled resolution sessions, failed to properly document attempts to contact Student's parents regarding the resolution meeting and, in any event, Student would suffer extreme prejudice if the matter were dismissed due to the change in the statute of limitations. Student also indicated that they offered to waive the resolution session but that the District never responded to that offer. The opposition included a declaration from Student's mother, stating that she had not received notice of the scheduled resolution sessions and that her prior attorney, Maureen Graves, did not give her proper notice of the resolution session scheduled for November 6, 2006, and assured her that the meeting would be rescheduled. Her declaration further states that she was not made aware of the importance of the resolution session until she obtained new counsel and that she now stands ready to participate. Therefore, Student urges that the motion to dismiss be denied.

DISCUSSION

The local educational agency (LEA) shall convene a meeting with the parents and the relevant members of the Individualized Education Program (IEP) within 15 days of receiving notice of the Student's complaint. (20 U.S.C. §1415(f)(1)(B)(i)(I); 34 C.F.R. §300.510(a)(1).) The resolution session need not be held if it is waived by both parties in writing or the parties agree to use mediation. (34 C.F.R. §300.510(a)(3).) If a parent does not participate in the resolution session, and it has not been otherwise waived by the parties, a due process hearing shall not take place until a resolution session is held. (34 C.F.R. §300.510(b)(3).) After the District has made reasonable attempts to secure the participation of the parents in the resolution session and has documented those attempts, at the end of the 30 day resolution period, the District may request that OAH dismiss the complaint.¹ (34 C.F.R. §300.510(b)(4).) The District may look to 34 Code of Federal Regulations part 300.322(d) for guidance about what type of documentation is required to support a dismissal for failure to attend a resolution session. (34 C.F.R. §300.510(b)(4).)

Here, the District has met its burden for dismissal by duly documenting its attempts to hold a resolution session within 15 days of receiving the complaint and the parent's failure to participate in the resolution session. The District's declarations support a finding that the former attorney and the parents were purposefully refusing to participate in the resolution session. Further, there has been no agreement to waive the resolution or proceed to mediation in lieu of the resolution session. The law is clear that the student must participate in a resolution session before a due process hearing may be commenced and that Office of Administrative Hearings (OAH) has discretion to dismiss the matter if the parent's refusal to participate in a resolution session and the District provides appropriate documentation.

¹ "If the LEA is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made (and documented using the procedures in §300.322(d)), the LEA may, at the conclusion of the 30-day period, request that a hearing officer dismiss the parent's due process complaint." (34 C.F.R. §300.510(b)(4).)

Student indicates that he would suffer significant prejudice if the matter were dismissed and that the District would only suffer minimal prejudice. Implicit within any dismissal of a matter is prejudice to a party, but that alone would not prevent the dismissal of a complaint, as permitted by statute, after the parent refused to participate in the resolution session. In this matter, the District has duly documented its attempts to hold the resolution session and has met its threshold for dismissal. However, Student now has the benefit of new counsel who has indicated a willingness to participate in the resolution session and understands the significance of refusing to participate. Therefore, the matter will not be dismissed at this time, but a resolution session must be held within 15-business days of this order, but **in no case** later than January 19, 2007. The timelines for due process hearing will recommence on January 31, 2007, pursuant to 20 U.S.C §1415(f)(1)(B).

ORDER

1. The District's motion to dismiss is denied.
2. Any dates that have been set in this matter are vacated.
3. The parties are ordered to participate in a resolution session within 15-business days of this order, but in case later than January 19, 2007.
4. The timelines for hearing pursuant to 20 U.S.C §1415(f)(1)(B) shall recommence on January 31, 2007.
5. The parties are ordered to attend a telephonic trial setting conference on January 31, 2007, at 10:00 a.m. to select dates for due process hearing.
6. Nothing in this order precludes either party from exercising any rights otherwise granted to it by statute.

Dated: December 28, 2006

RICHARD M. CLARK
Administrative Law Judge
Special Education Division
Office of Administrative Hearings